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No. 157

In the Supreme Court of the United States

OCTOBER TERM, 1947

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	5
Argument	8
I. The taxes claimed by the United States have priority under Section 3466 of the Revised Statutes to the exclusion of the State's claim for contributions	10
II. The right of priority attached to the full amount of the unemployment compensation tax for 1938 claimed by the United States	14
III. Payment of the State's claim was in violation of the priority of the United States	20
IV. Even if the assignee is entitled to a credit under Section 902, the United States is entitled to a return of the amount paid to the State	35
Conclusion	39
Appendix	40

CITATIONS

Cases:	
Berkshire Hardware Co., In re, 39 F. Supp. 663	30
Cook County Nat. Bank v. *United States*, 107 U. S. 445	23
Ever Krisp Food Products Co., In re, 307 Mich. 182	34
Florida v. *Mellon*, 273 U. S. 12	18, 29
Helvering v. *Northwest Steel Mills*, 311 U. S. 46	28
Helvering v. *Ohio Leather Co.*, 317 U. S. 102	28
Howes Bros. Co. v. *Unemployment Compensation Commission*, 296 Mass. 275	30
Illinois v. *Campbell*, 329 U. S. 362	11, 12, 13, 22, 32, 33
Illinois v. *United States*, 328 U. S. 8	11, 12, 22, 24, 32, 33, 36, 37
Lerman v. *Lincoln Novelty Co.*, 130 N. J. Eq. 144	34
Mellon v. *Michigan Trust Co.*, 271 U. S. 236	23
Parks v. *Central Door & Lbr. Co.*, 164 Ore. 363	34
Price v. *United States*, 269 U. S. 492	12, 14, 29
Prop'rs Mt. Auburn v. *Unemploy't Comp. Com.*, 301 Mass. 211	30
Rivard v. *Bijou Furniture Co.*, 67 R. I. 251, modified, 68 R. I. 358	10, 35

Cases—Continued Page

Spokane County v. *United States*, 279 U. S. 80 ..... 14, 29, 30
Steward Machine Co. v. *Davis*, 301 U. S. 548 29
United States v. *Amory*, Fed. Cas. No. 14,443 38
United States v. *Cochran*, Fed. Cas. No. 14,821 38
United States v. *Emory*, 314 U. S. 423 23
United States v. *Guaranty Trust Co.*, 280 U. S. 478 23
United States v. *New York*, 315 U. S. 510 ..... 12, 17, 29, 34, 39
United States v. *Oklahoma*, 261 U. S. 253 13
United States v. *Remund*, 330 U. S. 539 23
United States v. *State Bank of North Carolina*, 6 Pet. 29 ... 14, 29
United States v. *Waddill Co.*, 323 U. S. 353 ..... 11, 13, 34
White Plains Oil Corp., Matter of, 287 N. Y. 141 ... 18, 20, 31, 33

Statutes:

Internal Revenue Code:

Sec. 1200 (26 U. S. C. 1940 ed., Sec. 1200) 10
Sec. 1400, *et seq.* (26 U. S. C. 1940 ed., Sec. 1400, *et seq.*) 10
Sec. 1401 (26 U. S. C., 1940 ed., Sec. 1401) 10
Sec. 1410 (26 U. S. C., 1940 ed., Sec. 1410) 10
Sec. 1430 (26 U. S. C., 1940 ed., Sec. 1430) 10
Sec. 1601 (26 U. S. C., 1940 ed., Sec. 1601) 17
Sec. 1602 (26 U. S. C., 1940 ed., Sec. 1602) 17
Sec. 3661 (26 U. S. C., 1940 ed., Sec. 3661) 10

Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 607 10
Revenue Act of 1943, c. 63, 58 Stat. 21, Sec. 602 ..... 16, 18, 25, 27, 44

Revised Statutes:

Sec. 3466 (31 U. S. C., 1940 ed., Sec. 191) 8, 10, 13, 19, 24, 26, 28, 31, 40
Sec. 3467 (31 U. S. C., 1940 ed., Sec. 192) 21, 40

Social Security Act, c. 531, 49 Stat. 620:

Sec. 801 (42 U. S. C., 1940 ed., Sec. 1001) 10
Sec. 802 (42 U. S. C., 1940 ed., Sec. 1002) 10
Sec. 804 (42 U. S. C., 1940 ed., Sec. 1004) 10
Sec. 807 (42 U. S. C., 1940 ed., Sec. 1007) 10
Sec. 901 (42 U. S. C., 1940 ed., Sec. 1101) 9, 10, 15, 29, 31, 40
Sec. 902 (42 U. S. C., 1940 ed., Sec. 1102) 6, 7, 8, 15, 18, 21, 23, 24, 26, 28, 31, 41
Sec. 905 (42 U. S. C., 1940 ed., Sec. 1105) 15, 24, 41
Sec. 907 (42 U. S. C., 1940 ed., Sec. 1107) 15, 18, 42
Sec. 909 (42 U. S. C., 1940 ed., Sec. 1109) 17
Sec. 910 (42 U. S. C., 1940 ed., Sec. 1110) 17

Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360:

Sec. 609 17
Sec. 610 17
Sec. 902 ..... 15, 25, 27, 42

Statutes—Continued	Page
Massachusetts Acts, 1937, c. 421, Sec. 1	30
Massachusetts Acts, 1941, c. 685, Sec. 1	30
Massachusetts General Laws, C. 151A:	
Sec. 7	30
Sec. 17	30
Wisconsin Statutes, 1945, Sec. 108.23	30
Miscellaneous:	
H. Rep. No. 615, 74th Cong., 1st Sess. (1939–2 Cum. Bull. 600)	15, 19
H. Rep. No. 728, 76th Cong., 1st Sess. (1939–2 Cum. Bull. 538)	25
H. Rep. No. 871, 78th Cong., 1st Sess. (1944 Cum. Bull. 901)	25
S. Rep. No. 627, 78th Cong., 1st Sess. (1944 Cum. Bull 973)	25
S. Rep. No. 628, 74th Cong., 1st Sess. (1939–2 Cum. Bull. 611)	16
S. Rep. No. 734, 76th Cong., 1st Sess. (1939–2 Cum. Bull. 565)	18, 25
Treasury Regulations 90:	
Art. 205	18
Art. 211	21

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OPINIONS BELOW

The opinion of the District Court (R. 13–18) is reported at 65 F. Supp. 763. The opinion of the Circuit Court of Appeals (R. 29–33) is reported at 160 F. 2d 614.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 2, 1947. (R. 33.) The petition for a writ of certiorari was filed on June 27, 1947, and was granted on October 13, 1947. (R. 34.) The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

After the priority of the United States for payment of the debts due it has attached under Section 3466 of the Revised Statutes, whether the voluntary assignee for the benefit of creditors of the assets of the insolvent taxpayer is permitted to pay the claim of the State for unemployment compensation contributions and obtain a credit for such payment against the unpaid federal unemployment compensation taxes under Section 902 of the Social Security Act, as amended, thus defeating to that extent the priority of the United States.

STATUTES INVOLVED

The applicable statutes are printed in the Appendix, *infra,* pp. 40–45.

STATEMENT

The facts, as stipulated (R. 18–21) and found by the District Court (R. 13), are as follows:

On February 3, 1939, Somerville Sales and Service, Inc., a Massachusetts corporation, which was then without sufficient property to pay all its debts and was insolvent in the bankruptcy sense, made a voluntary assignment to Carlton W. Spencer for the benefit of creditors. Spencer, the assignee, accepted the assignment and con-

verted the assets into cash, realizing the amount of $1,135.11. (R. 13, 19, 20.)

The Collector of Internal Revenue seasonably filed claims with the assignee for 1938 and 1939 federal insurance contributions tax under Title VIII of the Social Security Act in the amount of $690.05, for 1938 federal unemployment compensation tax under Title IX of the Social Security Act in the amount of $963.08, and for 1939 capital stock tax in the amount of $21, all of which had been duly and seasonably assessed against the assignor corporation. The Commonwealth of Massachusetts (hereinafter referred to as "State") likewise seasonably filed a claim with the assignee for $803.72, representing state unemployment compensation contributions and interest due from the assignor of $775.34 for 1938 and $28.38 for 1939. (R. 13, 19, 21.)

On October 6, 1939, the assignee disbursed $803.72 to the State in full payment of its claim and paid $331.39, the amount remaining in his hands, to the Collector of Internal Revenue, who credited it against the amount due as federal insurance contributions (Title VIII) tax for 1938. The balance claimed by the United States of $1,342.74 with interest has not been paid. (R. 19, 20, 21.)

The United States commenced this suit against the assignee to establish the priority of its claims for taxes under Section 3466 of the Revised

Statutes and to enforce a personal liability against the assignee to the extent of $803.72 under Section 3467 of the Revised Statutes by reason of his payment of the Massachusetts taxes due from the assignor before he had satisfied the taxes due the United States. (R. 1–3, 18.) The State intervened, asserting that it was entitled in law to keep the $803.72 received from the assignee. (R. 8–11.) It agreed, however, to pay this amount to the United States, if the payment by the assignee to it was in disregard of the priority of the United States under Section 3466. The United States agreed that if it prevails, the judgment shall be limited to $803.72. (R. 13.)

The District Court held that under Section 3466 the United States had priority as to the full amount of the capital stock and federal insurance contributions (Title VIII) taxes due it, and as to 10% of the federal unemployment compensation (Title IX) taxes due it. (R. 13–18.) It ordered the State to pay $610.27 to the United States in liquidation of these taxes and the interest due thereon. (R. 12, 18.) From this judgment both the United States and the State appealed. (R. 22.)

The Circuit Court of Appeals reversed the District Court in part holding that the United States has complete priority under Section 3466 with respect to its entire claim for unpaid federal unemployment compensation taxes, as well

as to its claims for federal insurance contributions and capital stock taxes. (R. 30–33.)

SUMMARY OF ARGUMENT

I

It is settled that the insurance contributions, unemployment compensation, and capital stock taxes are debts due to the United States and are entitled to be satisfied first out of the insolvent debtor's property, to the exclusion of the State's claim for contributions due it, under Section 3466 of the Revised Statutes. The requirements of that section are otherwise met by the debtor's voluntary assignment of its property, which was insufficient to pay all of its debts. The liability for all of the federal taxes had been incurred prior to the assignment and the priority of the United States with respect to all of the taxes claimed, therefore, attached to the debtor's property on the date it was assigned, or in any event prior to the payment of the State's claim by the assignee on October 6, 1939.

II

The unemployment compensation tax for 1938 as to which the United States acquired priority was the full tax imposed by Section 901 of the Social Security Act. This is so because on the date the federal preference arose the assignee was not entitled to apply for a credit in reduction of the unemployment tax, which is authorized only

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for payments into an approved state fund by Section 902 of the Act, since he had not then paid any contributions to the State for 1938.

III

The aggregate of the taxes of the United States having a first preference under Section 3466 are in excess of the fund realized from the debtor's assets and the United States as a consequence is entitled to have the whole fund. The result is that the assignee has no property from which to pay the State's claim and he is unable to qualify under Section 902 for any credit, which is authorized only for a precedent payment to the State.

The view that the Congress intended in Section 902 to relinquish the priority of the United States as to 90% of the unemployment compensation tax imposed by Section 901 is not tenable. Such intent was not expressed and there is no reason to imply it in view of the fact that the two sections are not inconsistent. Section 902 in general terms authorizes a credit conditionally but does not deal particularly with the case where a taxpayer has become insolvent in circumstances in which Section 3466 has become operative. Furthermore, both statutes can be given full effect, each according to its own terms. Where, as in this case, the debtor's assets are insufficient to satisfy all of the debts due to the United States, so that a payment of the State's claim in any

amount is impossible, denial of the credit is not because Section 3466 excludes Section 902 but is the result of the requirement for actual payment to a State established by Section 902 itself as a condition precedent to allowance of a credit. Moreover, Section 902 does not grant any credit as a matter of right, but only conditionally, and it thus affords no basis for inferring a waiver of the priority of the United States which under Section 3466 is absolute in terms. Equitable principles can not, of course, be employed to achieve a result which the express terms of both Section 3466 and Section 902 do not support.

To sustain the State's contention would deny priority of payment, contrary to the mandate of Section 3466, not only to the unemployment tax but also to part of the other taxes which are due the United States and which are not subject to reduction by the credit provided for in Section 902 if the terms on which it is granted are met. Further, since the State's claim for contributions is not on a parity with the social security taxes of the United States under Section 3466, as this Court has held, it must follow that a payment of the State's claim would not amount to a satisfaction of the federal tax within the meaning of Section 3466.

IV

Even on the assumption that the assignee is not barred from claiming a credit in some amount

against the federal unemployment compensation tax, the maximum credit allowable would not be sufficient to prevent distribution of all of the debtor's assets to the United States. After subtracting the claims of the United States for insurance contributions and capital stock taxes with interest totalling $803.11, which are not subject to reduction by any credit, from the fund of $1,131.11 realized from the debtor's property, there remains $328 for all other claims. Assuming, contrary to the fact, that this amount could be used to secure a credit in that amount against the federal unemployment compensation tax of $963.08, there would still remain due to the United States $635.08 on its claim for unemployment tax. Since this is a claim having priority over the State's claim under Section 3466, and since it is in excess of the $328 remaining for distribution, it follows that the entire fund realized from the debtor's property must be awarded to the United States.

ARGUMENT

This case is concerned with the question of whether Section 902 of the Social Security Act, as amended (Appendix, *infra*), is to be construed as permitting a debtor's assignee, who holds insufficient assets to pay the taxes claimed by the United States, to pay, after Section 3466 of the Revised Statutes (Appendix, *infra*) according priority to debts due the United States

has become operative, the tax claimed by the State and to take credit for the payment against all or any part of the taxes claimed by the United States. The Circuit Court of Appeals held that Section 3466 required that all of the debtor's property be applied to the satisfaction of the taxes due the United States and that, having done this, nothing remained to pay the State's claim, thus precluding the assignee from securing the credit authorized by Section 902 in certain circumstances for payments of contributions to a State. (R. 29–33.)

The State's contentions appear to be that under Section 902 of the Social Security Act only 10% of the tax imposed by Section 901 of the Act (Appendix, *infra*) is to be collected by the United States (Br. 12–18); that the contributions due the State are a part of the federal tax imposed by Section 901 and their payment amounted to satisfaction of 90% of the federal tax for purposes of Section 3466 (Br. 20–21, 31); and that the assignee had the legal right to elect to pay first the part of the federal tax represented by the State's claim to the exclusion of the other federal taxes which were due (Br. 30–31). It is the position of the United States that none of these contentions is supportable in view of the statutory provisions and previous decisions of this Court and, as the following argument will

show, the Circuit Court of Appeals correctly rejected all of them.

I

THE TAXES CLAIMED BY THE UNITED STATES HAVE PRIORITY UNDER SECTION 3466 OF THE REVISED STATUTES TO THE EXCLUSION OF THE STATE'S CLAIM FOR CONTRIBUTIONS

We believe it is now settled that claims of the United States for insurance contributions taxes, for unemployment compensation taxes, and for capital stock taxes[1] have absolute priority as debts due the United States under Section 3466 of the Revised Statutes, which provides, insofar as here material, that—

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[1] These are the capital stock tax of $21 for 1939 imposed by Section 1200 of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 1200); unemployment compensation tax of $963.08 for 1938, imposed by Section 901 of the Social Security Act; and insurance contributions taxes of $669.39 for 1938 and of $20.66 for 1939, imposed, respectively, by Section 801 and/or 804 of the Social Security Act (42 U. S. C. 1940 ed., Secs. 1001, 1004) and by Section 1400 and/or 1410 of the Internal Revenue Code. (R. 19.) The record does not show whether the insurance contributions taxes were the employees' tax or the employer's tax under the last cited sections of the Social Security Act and the Internal Revenue Code, or a combination of the two. To the extent, however, that the employees' taxes are contained in the two amounts, they were collected and held by the employer-debtor as a special fund in trust for the United States (Sections 802 and 807 (c), Social Security Act (42 U. S. C. 1940 ed., Secs. 1002, 1007); Section 607, Revenue Act of 1934, c. 277, 48 Stat. 680; Sections 1401, 1430 and 3661, Internal Revenue Code) and were not therefore a part of the debtor's funds available for distribution to its creditors and subject to the priority accorded the United States by Section 3466 of the Revised Statutes. Cf. *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, modified, 68

> Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or * * *

Illinois v. *United States*, 328 U. S. 8, so holds with respect to both kinds of social security taxes. Although the property of the insolvent debtor, available for distribution to all creditors, in the *Illinois* case was less than the claim of the United States for the insurance contributions taxes alone, the Court's opinion plainly included the unemployment taxes within the holding. If this point were in any doubt, it is settled by *Illinois* v. *Campbell*, 329 U. S. 362, 366–367, in which the Court stated explicitly that the previous *Illinois* case decided that both types of social security taxes were entitled to priority under Section 3466, if the other circumstances necessary to the application of that section were present. See also *United States* v. *Waddill Co.*, 323 U. S. 353. Moreover, since "it is well settled that taxes are debts within the meaning of Section 3466"

R. I. 358. In *Illinois* v. *Campbell*, 329 U. S. 362, 376, fn. 18, where the record showed the amount of the employees' tax included in the Title VIII taxes there held to have priority, this Court found it unnecessary to decide the point, since the whole amount was entitled to priority over all other creditors under Section 3466 in any event.

(*Illinois* v. *United States*, 328 U. S. 8, 9; see *Price* v. *United States*, 269 U. S. 492) the capital stock taxes are covered by that section also.

Illinois v. *United States, supra*, decided further that the claim of a State for contributions taxes under its own unemployment compensation act is not "tantamount to a claim of the United States" (p. 11) for purposes of Section 3466, and yields, at least in the absence of a prior specific and perfected lien for the State's claim,[2] to the priority of the United States for the taxes due it. See also *Illinois* v. *Campbell*, 329 U. S. 362, 366–367. Cf. *United States* v. *New York*, 315 U. S. 510, which, although it was concerned with the priority and allowance of claims under the Bankruptcy Act, established that the claims of the United States for both kinds of social security taxes and the claim of a State for contributions are separate and distinct claims. The State's argument that its claim represents a portion of the federal tax imposed by Section 901 (Br. 31) is contrary to these decisions.

The taxes claimed by the United States in this case are concededly "due" in the amounts claimed, except with respect to the unemployment compensation tax (see Point II of this argument,

[2] The question is still undecided as to whether such a lien will defeat the priority of the United States under Section 3466. See *Illinois* v. *Campbell*, *supra*, pp. 370–371. Our position is that it does not. In the instant case the issue is not present at all, since the State does not contend that at any time it had a specific and perfected lien.

infra). Putting aside for the present the question as to the amount of the unemployment tax due, this tax, whatever its amount, and the capital stock and insurance contributions taxes are therefore entitled to be "first satisfied," that is, to the exclusion of the claim of the State for the taxes due it under its unemployment compensation law, if the other requirements of Section 3466 are met. It is plain that they are met, and indeed no argument has been made that they are not. It was stipulated that the debtor, Somerville Sales & Service, Inc., made a voluntary assignment of its property for the benefit of creditors and that on the date of the assignment, February 3, 1939, it was without sufficient property to pay all of its debts. (R. 19). This was insolvency in the sense contemplated by Section 3466. *United States* v. *Oklahoma*, 261 U. S. 253:

It is well settled that the priority of the United States under Section 3466 of the Revised Statutes dates from the time the insolvent debtor transfers, or loses control over, his property. *Illinois* v. *Campbell*, 329 U. S. 362, 369–370; *United States* v. *Waddill Co.*, 323 U. S. 353, 355–356; *United States* v. *Oklahoma*, 261 U. S. 253, 260. At the time of the assignment on February 3, 1939, the debtor had incurred the liabilities for all of the taxes claimed by the United States in a total amount of $1,674.13 (R. 2, admitted by the assignee, R. 5, and by the State, R. 8; R. 4),

although some of the taxes were formally assessed after the date of the assignment.[3] Because of the admitted fact that liability for the taxes had then been incurred, we believe that the date of the assignment governs the incidence of priority as to all of the taxes (cf. *United States* v. *State Bank of North Carolina,* 6 Pet. 29; *Price* v. *United States,* 269 U. S. 492), but even if the later dates of assessment control, a point which was left undecided in *Spokane County* v. *United States,* 279 U. S. 80, 93, priority in the United States, even as to the taxes assessed after the assignment, had been created prior to the payment to the State on October 6, 1939. It has never been urged in this case that the payment to the State, which is the only event relied on by the State to defeat the priority of the United States, preceded the date on which Section 3466 came into operation with respect to all the taxes claimed by the United States.

II

THE RIGHT OF PRIORITY ATTACHED TO THE FULL AMOUNT OF THE UNEMPLOYMENT COMPENSATION TAX FOR 1938 CLAIMED BY THE UNITED STATES

As previously stated, the amounts of the taxes "due" to the United States and entitled to pri-

[3] The record in this case shows only that the taxes were duly and seasonably assessed (R. 19) but, as indicated in our Brief in Opposition to certiorari (p. 6), some of the taxes due the United States were assessed after February 3, 1939, but prior to October 6, 1939.

ority within the meaning of Section 3466 are not in question with the exception of the unemployment compensation tax for 1938. As to this tax, the District Court took the view that the United States acquired a right of complete priority only as to 10% of the amount of $963.08 claimed by the United States. (R. 17–18.) The District Court's view was not accepted by the Circuit Court of Appeals and it squarely collides with the controlling statutory provisions.

The liability arose under Section 901 of the Social Security Act (Appendix, *infra*) which levies a tax upon the total wages payable by an employer, as defined in Section 907 (Appendix, *infra*) with respect to employment as defined in the Act, during that year. Section 902 of the Act (Appendix, *infra*) provides that the taxpayer may credit against the tax imposed by Section 901, but not to exceed 90% thereof, the amount of contributions, with respect to employment during the taxable year, "paid by him," before the date of filing his federal return for the year (for 1938 this was on or before January 31, 1939—see Section 905 (b) (Appendix, *infra*)) into a certified state unemployment fund.[4] Section 902 (a) of

[4] H. Rep. No. 615, 74th Cong., 1st Sess., p. 34 (1939–2 Cum. Bull. 600, 608), stated:

"SECTION 902: A taxpayer may credit against his tax the total amount of contributions he has paid to State unemployment compensation funds in accordance with State unemployment compensation laws. The credit against the tax

the Social Security Act Amendments of 1939 (Appendix, *infra*) and Section 602 (a) of the Revenue Act of 1943 (Appendix, *infra*) both extended the time in which payment into a state fund of contributions for the years 1936, 1937 and 1938 could be made for purposes of securing a credit, but these amendments did not dispense with the

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measured by wages payable with respect to employment in a calendar year will be allowed only for contributions which themselves are paid (before the date for filing the tax return under this title for such year) with respect to employment in such year.

"The total credit which a taxpayer may claim against his tax for any year shall not be more than 90 per cent of the tax. Thus if the tax is $100 the total credit which may be claimed can not be more than $90, even though the total amount of contributions may be greater than that."

S. Rep. No. 628, 74th Cong., 1st Sess., p. 46 (1939–2 Cum. Bull. 611, 621–622), was substantially identical with the above, and in addition contained a further explanation of the credit as follows (pp. 12–13 (1939–2 Cum. Bull. 612–613)):

"In States which have genuine unemployment compensation laws the employers can present as a credit against the Federal tax the contributions which they have made to the unemployment compensation funds of these States. This credit, however, is allowed only up to 90 per cent of the Federal tax, 10 per cent being payable into the Federal Treasury in any event.

"This tax offset device is modeled after the provision in the Federal estate tax law, under which a credit is allowed up to 80 per cent of the Federal tax for amounts paid under State inheritance tax laws. With a uniform tax and this offset device, employers in all States will be put in an equal competitive position. No State can gain any advantage through failing to establish an unemployment compensation system."

* * * * *

necessity for actual payment to the State as a condition precedent to allowance of the credit.[5]

Under these statutes the full tax is due the United States until the taxpayer has qualified for a credit against it by paying contributions to a State. This Court stated in *United States* v. *New York*, 315 U. S. 510, 517:

> The amount of the tax assessable under § 901 is definite and fixed, once the single variable, the total of the wages paid during the year, is determined. Although the employer is free to obtain a credit against it by contributing to his state fund, it cannot be said that it is any the less a tax because the employer has failed, either through choice or lack of resources, to make such a contribution. * * *

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[5] Commencing with the year 1938, Sections 909 and 910 of the Social Security Act made provision for an additional credit, not material in this case, equal to the difference between the amount of contributions an employer would have been required to pay if he had been subject to the highest rate fixed by the State and the amount he actually paid the State under a reduced rate applicable to him because he maintains an approved guaranteed employment account or contributed to an approved pooled fund or reserve account as defined in Section 910. (Cf. the State's brief, pp. 16–17.) The aggregate of the credit for payment to a State and the additional credit was limited by Section 909 (c) to an amount not to exceed 90% of the federal tax. The provision for the additional credit was continued in amended form in Section 1601 (b) and Section 1602 of the Internal Revenue Code, as amended by Sections 609 and 610 of the Social Security Act Amendments of 1939. However, as stated, the additional credit is not involved in this case and no further reference will be made to it.

S. Rep. No. 734, 76th Cong., 1st Sess., p. 91 (1939–2 Cum. Bull. 565, 592), also confirms that the employer is liable for the full tax until the credit has been earned by satisfying the conditions on its allowance in Section 902. And see *Matter of White Plains Oil Corp.*, 287 N. Y. 141. Cf. *Florida* v. *Mellon*, 273 U. S. 12. Furthermore, it must be emphasized that, even when a payment is made, credit is allowable only in the amount paid, but is limited to a maximum figure of 90% of the federal tax, and in some circumstances to a maximum amount of 81% of the federal tax (see Section 602 (a) of the Revenue Act of 1943).

No contributions were paid to the State either by the taxpayer-debtor or by its assignee prior to October 6, 1939, and this date was the very first on which a credit could be claimed, if it could be had at all, under the terms of Section 902.[6] But, as has been shown, the United States

[6] The payment to the State of the contributions due it on October 6, 1939, was a date which was within the period allowed for paying a state and claiming a credit as extended by Section 902 (a) of the Social Security Act Amendments of 1939, which was enacted on August 10, 1939, and by Section 602 (a) of the Revenue Act of 1943. An employer of eight or more persons (Section 907) is the taxpayer liable for the tax and eligible for the credit if he meets the conditions of Section 902. While the assignee is not such a taxpayer literally since he had no employees himself, Article 205 of Treasury Regulations 90 (1936 ed.) provides that an employer for purposes of the Title IX tax may be a person acting in a fiduciary capacity or on behalf of another, such as, *inter alia*, an assignee for the benefit of creditors. But

acquired the right to prior payment of all the taxes due it, including the tax imposed by Section 901, before the payment to the State on October 6, 1939. Since on the date when the United States acquired first preference under Section 3466 the assignee was not entitled to any credit, it must follow that the priority of the United States attached to the full tax of $963.08 claimed to be due.[7] This amount, added to the Title VIII and capital stock taxes due the United States, results in an aggregate amount of $1,674.13, which has preference under Section 3466.

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even if the assignee is treated as the taxpayer for purposes of the credit and even though he undertook to pay the State within the time limitation fixed by the amendments to Section 902, nevertheless, as developed, *infra*, the payment does not qualify him for any credit because it was rendered ineffective by Section 3466, which operated prior to the payment to segregate all the debtor's assets to satisfaction of taxes due the United States.

[7] It may be noted here that the District Court was wrong in treating only $96.31, or 10% of the federal tax, as due the United States as a priority debt even assuming *arguendo* that the October 6th payment qualified the assignee for a credit in the full amount paid. The amount paid to the State was $803.72, consisting of 1938 tax and interest of $775.34 and 1939 tax and interest of $28.38. (R. 21.) The federal tax of $963.08 was for 1938 only. (R. 19.) Section 902 in terms authorizes a credit against the federal tax for a particular year of the contributions paid to a state fund with respect to employment during the *same taxable year*. See also H. Rep. No. 615, 74th Cong., 1st Sess., p. 34, quoted in footnote 4, *supra*. Thus the maximum credit allowable against the 1938 federal tax would be the 1938 State tax in-

III

PAYMENT OF THE STATE'S CLAIM WAS IN VIOLATION OF THE PRIORITY OF THE UNITED STATES

The total of the taxes due the United States of $1,674.13 is in excess of the total fund of $1,135.11 realized from the debtor's property. Thus, the United States has first claim to the entire fund under the clear mandate of Section 3466, leaving nothing from which the State's claim could be paid. And since a credit is allowable under Section 902, as amended, only for amounts paid a State and since there are no assets of the insolvent debtor with which to pay the State any amount, there is no way in which any credit may be procured by the assignee upon the facts of record in this case, as the lower court held. (R. 33.) See also *Matter of White Plains Oil Corp.*, 287 N. Y. 141.

The fact that the assignee actually undertook to pay the State the amount of its claim is of no significance. The issue here is whether such payment could properly be made after all the

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cluded in the payment. This was something less than $775.34; that amount includes both tax and interest but the record does not show the amounts. Deducting the State tax, there would be left unsatisfied an amount in excess of $187.74 of the federal Title IX tax, which is the amount the District Court should have treated, under its method of allocating the fund, as being in the first category for payment.

We argue, *infra* (Point IV), that even if it is assumed that the assignee is permitted a credit after Section 3466 became operative, the allowable credit in this case would be so small that the entire property of the debtor would be awarded to the United States.

debtor's assets had become dedicated to prior satisfaction of the taxes due the United States. The payment clearly could not properly be made since after that time a payment to anyone other than the United States violates the express direction of Section 3466. It follows that the State must turn over the amount paid to it to the United States as it has agreed to do if the assignee's payment was in disregard of the priority of the United States under Section 3466.[*] (R. 13.) Since the State is required to return what it received, no credit may be allowed for the assignee's payment to it. There is nothing in Section 902 to warrant, and its purpose forbids, the view that a credit is allowable for a payment to a State which must be refunded by the State. Cf. Article 211 (g) of Treasury Regulations 90, as amended by T. D. 5383, 1944 Cum. Bull. 560.

The only way in which the complete priority of the United States as to the entire property of

[*] The complaint filed by the United States (R. 1–4) was to enforce a personal liability against the assignee to the extent of $803.72 under Section 3467 of the Revised Statutes (Appendix, *infra*) which makes an assignee, who pays any debt before he "satisfies and pays" the debts due the United States from his assignor, answerable in his own person and estate, to the extent of the payment, for the unpaid debts due the United States. The return of the amount received by the State, which intervened in the proceeding, if the payment was not permitted by Section 3466, will release this liability of the assignee. The United States has limited its claim to $803.72, without cost or interest, by stipulation. (R. 20.)

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the debtor could be defeated in this case would be to read Section 902 as waiving, or creating an exception to, Section 3466 of the Revised Statutes.[9] The State's contention (Br. 26–27) that the assignee had an option under Section 902 as to 90% of the tax imposed by Section 901 to pay

[9] This point was not decided expressly by this Court in either of the two *Illinois* cases, but, as we show *infra*, the reasoning of the cases compels the view that the priority of the United States is not impaired to any extent by Section 902. In *Illinois* v. *United States*, 328 U. S. 8, the total of the debtor's property available for distribution to creditors was less than the federal capital stock tax and insurance contributions taxes combined, leaving out of consideration the unemployment compensation tax imposed by Section 901. The Supreme Court of Illinois had, however, decided that the debtor's trustee was not entitled to credit against the federal tax under Section 902 of the Social Security Act, as amended by Section 602 (a) of the Revenue Act of 1943, and had awarded all of the debtor's property to the United States to satisfy its claims. 391 Ill. 29, 35–37, 46. This Court affirmed the award, holding that all of the taxes due the United States preceded, in order of payment, the contributions due the State of Illinois under Section 3466. In *Illinois* v. *Campbell*, 329 U. S. 362, the assets available for distribution were slightly in excess of the Title VIII taxes due the United States. The Supreme Court of Illinois had awarded to the United States an amount sufficient to pay the Title VIII taxes in full, with interest, and, on the theory that the receiver was not precluded there from claiming a credit against the Title IX tax under Section 603 (b) of the Revenue Act of 1943, had given the balance to the State to be credited on the claim of the United States for Title IX taxes. 391 Ill. 29, 33–34, 46. Although the award to the State was believed to be erroneous, the United States did not petition for certiorari and that issue was not before this Court.

either the United States or the State [10] is in effect a contention that Section 902 relinquishes the priority of the United States as to 90% of the federal tax.

The language of Section 902 does not expressly surrender priority as to 90% or any other portion of the federal tax, and the State must therefore derive a waiver of Section 3466 to this extent by implication, if it is to prevail. While this Court has in a few instances implied that Congress intended to relinquish priority under Section 3466 as to certain debts due the United States, this was because later legislation dealing expressly with such debts was so inconsistent with Section 3466 as to compel the conclusion. See *Cook County Nat. Bank* v. *United States*, 107 U. S. 445; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; cf. also *Mellon* v. *Michigan Trust Co.*, 271 U. S. 236. But as stated in *United States* v. *Emory*, 314 U. S. 423, 433, only the plainest inconsistency would warrant the finding of an implied exception to the operation of so clear a command as that of Section 3466. Cf. *United States* v. *Remund*, 330 U. S. 539, 544–545.

[10] Even considered alone, Section 902 can not be construed as granting such an option. It merely authorizes a credit against the federal tax in the exact amount paid to a state, if a taxpayer meets also the other conditions on which the credit is granted; the amount paid the State, and thus the credit, may actually be less than 90% of the federal tax. And until a credit is procured, the entire federal tax is payable.

There is no "plain inconsistency" between Section 3466 and Section 902. As pointed out in *Illinois* v. *United States*, 328 U. S. 8, 11-12, Section 3466 is one of the collection remedies which was intended by Congress to aid in the collection of the Title IX tax (see Section 905 (b) of the Social Security Act) and it is not inconsistent with the purposes or express language of the Social Security Act. This would seem to decide the matter insofar as Section 902 is concerned, particularly since the Court discussed its provisions in general terms (p. 10) in connection with the holding that the Social Security Act was consistent with the priority of the United States. In any event, it is plain that Section 902 is not inconsistent with Section 3466.

In the first place, the two statutes differ in the scope of their application. Section 902 is a general one, outlining broadly the conditions on which a credit will be allowable to taxpayers. It does not relate specifically to the case where a taxpayer has become insolvent, whereas Section 3466 operates exclusively in the latter field. The same situation exists in connection with the amendments to Section 902 which authorize a credit, regardless of the date of payment, if the taxpayer's assets were, within specified periods, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control

of, a court of competent jurisdiction.[11] Such fiduciaries may take possession of assets in a variety of situations, whether or not the owner may be solvent or insolvent. Thus the subject matter of the amendments is more general in scope and is not confined to the special situation where the taxpayer has become insolvent in the bankruptcy sense and has been divested of his assets in one of the ways specified by Section 3466.[12]

A general statute like Section 902 could hardly be the basis for an inference that Congress intended therein to waive the long standing priority of the United States given specifically by Section 3466 in certain situations. And, there is nothing in the legislative explanations in connection with the credit (fns. 4 and 12, *supra*) to

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[11] The removal of the time limitation for paying a State's claim made by these amendments apparently does not apply to a voluntary assignee at common law for the benefit of creditors, since he is not a fiduciary appointed by, or under the control, of a court.

[12] The committee reports in connection with Section 902 of the Social Security Act Amendments of 1939 and Section 602 of the Revenue Act of 1943 do not refer to Section 3466 and we find nothing to disclose a purpose to allow receivers and other fiduciaries to have a credit if payment to a State will violate the priority accorded by Section 3466 to the taxes and other debts due to the United States. See H. Rep. No. 728, 76th Cong., 1st Sess., pp. 64, 78 (1939–2 Cum. Bull. 538, 555, 564); S. Rep. No. 734, 76th Cong., 1st Sess., pp. 77, 90 (1939–2 Cum. Bull. 565, 582, 590–591); H. Rep. No. 871, 78th Cong., 1st Sess., pp. 73–75 (1944 Cum. Bull. 901, 956–957); S. Rep. No. 627, 78th Cong., 1st Sess., pp. 96–97 (1944 Cum. Bull. 973, 1043–1044).

induce the view that the opportunity to secure a credit under Section 902 was intended as a right paramount to the priority of the United States under Section 3466.

Furthermore, both Section 902 and Section 3466 can consistently be given effect according to their terms. The application of Section 3466 to the Title IX tax due the United States, whenever the circumstances necessary to its operation have been met, does not preclude the application of Section 902 at the same time to allow a credit according to its terms, if the taxpayer has complied or can comply with the conditions on which it is granted. Section 902, of course, does not grant a credit in any amount, even when Section 3466 is not called into force, as an absolute right. In many cases the fiduciary of an insolvent debtor will be able to procure a credit under Section 902 after Section 3466 has become effective. In circumstances where the debtor's property exceeds the aggregate of the debts due the United States, it may be possible after the right of priority in the United States has arisen, for a fiduciary under the control of a court to pay a State's claim for contributions wholly or in part out of the excess and thereby to secure a credit against the Title IX tax claimed by the United States.[13] The allow-

[13] This situation is illustrated by the hypothetical case posed by the District Court in its opinion (R. 15) and by the example mentioned in the State's brief (pp. 21–22). Thus, in a case where the insolvent with $200 worth of

ance of the credit in these circumstances, however, is not because Section 902 is deemed to be inconsistent with Section 3466, or because Section 3466 is demoted to a subordinate position by Section 902. On the contrary, the priority of the United States under that section is recognized and is given full effect, as is Section 902.

Similarly, both sections can operate according to their terms in cases like the present one where an insolvent debtor's assets are less than the taxes due the United States and all of them

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property, was indebted to the United States for Title IX tax of $100, to the State for contributions of $90, and to general creditors for $200, the proper distribution under Section 3466 very well might be $10 to the United States, $90 to the State, and $100 to general creditors. Whether it would be a proper distribution would depend on whether the fiduciary holding the debtor's assets was barred by the conditions of Section 902 as amended or by some state priority statute from paying the State and claiming a credit for the payment. If he was not barred from the credit, it would be possible for the fiduciary, after paying $100 to the United States, to pay $90 to the State; then to claim a credit for the $90 payment; and to secure a refund of the federal tax in that amount (Section 902 (d) of the Social Security Act Amendments of 1939 and Section 602 (c) of the Revenue Act of 1943). Because it would be possible to do these things, the order of distribution could very well cut through to the end result and award only 10% of the claim of the United States to it in the first instance. A similar distribution giving effect to the final result, might well be made in the State's example also, provided the State priority statute allowed payment of the State's claim for contributions immediately after payment of the federal tax and provided a credit under Section 902 was otherwise obtainable.

have under Section 3466 been hypothecated to the satisfaction, first, of the federal claims. Compliance with the condition precedent on which Section 902 has authorized a credit is then impossible, but the credit is denied not because Section 3466 operates to exclude Section 902 or to nullify it, but because the terms of Section 902 itself deny it where no payment can be made. As previously pointed out, Congress intended the full tax imposed by Section 901 to be collected by the United States, unless a credit against it had been secured under Section 902. *United States* v. *New York, supra.*

Furthermore, the priority of the United States under Section 3466 is absolute and all-inclusive in its terms, whereas there is no absolute right to a credit under Section 902. The very fact that the last section gives only a conditional right precludes the view that it was intended to waive the priority statute in any respect. The privilege of a credit upon qualification for it was given by Section 902 in the first instance as a matter of legislative grace and it could of course be withheld entirely in certain circumstances as the Congress indicated. Cf. *Helvering* v. *Northwest Steel Mills,* 311 U. S. 46; *Helvering* v. *Ohio Leather Co.,* 317 U. S. 102. Thus, the termination of the opportunity to secure a credit by force of circumstances, where under Section 3466 all of a taxpayer's assets are required to satisfy debts due the United States and nothing remains

to pay the State, therefore can not be objectionable. As pointed out, Section 3466 itself does not preclude the credit, but even if the credit had been completely withdrawn when Section 3466 became effective, such action would have been proper. The operation of Section 3466, whatever its effect on other creditors, is justified as a measure necessary to assure the federal revenues.[14] *Spokane County* v. *United States*, 279 U. S. 80, 92; *Price v. United States*, 269 U. S. 492, 500; *United States* v. *State Bank of North Carolina*, 6 Pet. 29.

To uphold the contention that Section 902 impliedly revokes the federal priority as to 90%, or some, of the Title IX taxes would open the way to a further serious impairment of the federal priority. The States of course may establish relative priorities for the debts due to them or to other creditors and most States accord higher priorities to certain other claims than they do to social security taxes.[15] Thus, if the State's con-

[14] There is of course no basis for a view that the Title IX tax was not levied for revenue purposes. The tax imposed by Section 901 is a tax paid into the general fund of the Treasury as any other internal revenue collection and is not earmarked for any purpose. It is subject to appropriation for any federal purpose as is any other tax collected by the United States. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 574, 577–578, 585, 598; cf. *United States* v. *New York*, 315 U. S. 510, 517, and *Florida* v. *Mellon*, 273 U. S. 12, 14.

[15] This is true in Massachusetts. The unemployment compensation law effective January 1, 1937, provided that "Contribution payments and interest thereon or penalty assessed

tention here were accepted as the correct rule, the Federal Government might be forced to stand aside as to 90% of its Title IX claim on the theory that the federal tax could be reduced to that extent by credit for payment of a State's claim for contributions, yet it would be impossible for the fiduciary to pay the State's social security tax because under State law the insolvent debtor's assets were required to be used to satisfy different claims with higher priorities. Cf. *Spokane County* v. *United States*, 279 U. S. 80, 91. The credit then could not be secured, with the result that the federal tax could not be reduced by a credit and could not be satisfied by payment, and would be subordinated to claims other than the State social security tax. This illustrates the potential dangers to the federal priority which are inherent in the State's position here. Certainly surrender of federal prior-

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in lieu thereof, shall have priority over all other claims against an employer, except tax and wage claims." Massachusetts General Laws (Ter. id.) c. 151A, Sec. 7, as amended by Massachusetts Acts, 1937, c. 421, Sec. 1. Massachusetts Acts, 1941, c. 685, Sec. 1, effective October 24, 1941, amending c. 151A, continued in Section 17 thereof the priority of contributions over all other claims except wage claims, but eliminated tax claims from the exception. While originally Massachusetts contributions were apparently not deemed to be taxes (*Howes Bros. Co.* v. *Unemployment Compensation Commission*, 296 Mass. 275, 281), it now is recognized that they are taxes (*Prop'rs Mt. Auburn* v. *Unemploy't Comp. Com.*, 301 Mass. 211, 212–213; *In re Berkshire Hardware Co.*, 39 F. Supp. 663 (Mass.)) and the change in the State pri-

ity as to a particular tax in favor of a particular claim of a State is not to be implied if as a consequence the federal priority may be impaired in other respects.

It seems equally plain that the priority of the taxes due the United States is not to be displaced on the theory that the maximum credit authorized by Section 902 should be allowed under equitable principles, even though it cannot be gained, because of insufficient assets, by actual payment to the State, as that section provides. See *Matter of White Plains Oil Corp.*, 287 N. Y. 141, 145–146. The terms of Section 902 afford no basis for allowing a credit on equitable grounds and of course Section 3466 itself is an exception to the equitable principle of marshaling assets.

The State's contention in this case of course is not confined to the assertion that the assignee may reduce the unemployment tax imposed by Section 901 by paying the State's claim even though such payment is precluded by the terms of Section 3466, but it takes the wholly unwarranted position that having paid the State, the assignee may apply the credit for the payment against the debtor's liability, not merely for the unemployment tax, but for any federal tax. Sec-

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ority statute may have been made to reflect this new concept of the nature of the contributions.

The unemployment compensation laws of every other State, with four exceptions, expressly provide that the contributions due thereunder are inferior, or rank equally, in priority with certain other claims. Cf. Wisconsin Statutes, 1945, Sec. 108.23, which has a unique provision.

tion 902 itself forbids this, since it authorizes credit in certain circumstances against the tax imposed by Section 901 only. Cf. *Illinois* v. *Campbell,* 329 U. S. 362, 367, fn. 5. Furthermore, to recognize the payment to the State as the basis for a credit, even against the Title IX tax only, results in defeating the priority of the United States to a large extent under the facts here. Not only would this have the effect of reducing the claim of the United States for Title IX taxes and leaving the reduced amount unsatisfied in its entirety but it would also deny priority in part to the United States for the other taxes due it. This is so because the amount left for the United States after payment of the State's claim was only $331.39, whereas the total of its claims for Title VIII and capital stock taxes alone, exclusive of interest, was $711.05. Thus, the result of allowing the State to retain the $803.72 paid to it is to elevate its claim to a position paramount to all of the taxes due the United States, contrary to Section 3466 and to *Illinois* v. *United States,* 328 U. S. 8.

The retention by the State of any part of the $803.72 paid to it is not to be justified on the theory that the payment to the State actually "paid" or "satisfied" the federal tax or taxes to that extent, as the State contends. (Br. 24, 25–26, 30–31.) *Illinois* v. *United States, supra,* has already decided that an *unpaid* State's claim

for contributions is not on a parity with either the Title VIII or Title IX tax for purposes of Section 3466, and it follows *a fortiori* that a payment to a State of its claim, after the priority of the United States has attached to all the debtor's assets, is not tantamount to a satisfaction of the Title IX tax due the United States for purposes of the priority statute.[16] If in the case which this Court affirmed on other grounds in *Illinois* v. *Campbell*, 329 U. S. 362, the award by the Supreme Court of Illinois to the State of Illinois of the balance (after payment of the Title VIII tax to the United States) with directions to credit it on the claim of the United States for unemployment compensation taxes (391 Ill. 29, 46; see fn. 9, *supra*) is construed as a holding that such payment to the state would "satisfy" the Title IX tax due to the United States within the meaning of Section 3466, we submit that the award to this extent is contrary to *Illinois* v. *United States, supra.*

The decision of the Circuit Court of Appeals in this case is completely supported by *Matter of*

[16] This is not to say of course, as we have previously indicated (*supra*), that the Title IX tax due the United States may not be reduced by a credit, prior to the incidence of the priority of the United States, and after the preference has attached if the insolvent debtor has sufficient assets so that his fiduciary may pay a state without violating Section 3466.

White Plains Oil Corp., supra. In that case upon substantially identical facts the Court of Appeals of New York sustained the priority of the United States in respect of all the taxes claimed by it, including the full amount of Title IX taxes imposed by Section 901, to the exclusion of the state's claim for contributions, even though it was apparent that if the debtor had remained solvent or if its assets had been in excess of the total taxes claimed by the United States, the federal claim for Title IX tax might have been reduced to 10% of the amount claimed. In other cases also, claims of the United States for taxes under Title IX of the Social Security Act have been accorded complete priority over claims of a state for unemployment compensation contributions. Thus, they are consistent with the decision below, although the priority of the United States was either conceded, or the contentions made here were not urged, or, if urged, were not discussed in the opinion. *United States* v. *Waddill Co.*, 323 U. S. 353; *In re Ever Krisp Food Products Co.*, 307 Mich. 182; *Lerman* v. *Lincoln Novelty Co.*, 130 N. J. Eq. 144; cf. *Parks* v. *Central Door & Lbr. Co.*, 164 Ore. 363, 378–381. Nothing in *United States* v. *New York*, 315 U. S. 510, supports the State's position, since the proceeding there was in bankruptcy in which taxes due by the bankrupt to the United States and the States

have equal priority under Section 64 (a) (4) of the Bankruptcy Act.[17]

IV

EVEN IF THE ASSIGNEE IS ENTITLED TO A CREDIT UNDER SECTION 902, THE UNITED STATES IS ENTITLED TO A RETURN OF THE AMOUNT PAID TO THE STATE

Although we believe we have conclusively demonstrated that the United States has a paramount claim to all of the debtor's property under Section 3466 to satisfy the taxes due it and that the assignee is not entitled to any credit against the tax imposed by Section 901 of the Social Security Act, nevertheless we shall assume *arguendo* here that a credit in some amount is possible and explore the questions as to the amount of the allowable credit and the proper distribution of the assets on this assumption.

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[17] *Rivard* v. *Bijou Furniture Co.*, 67 R. I. 251, as modified 68 R. I. 358, was concerned with whether Section 3466 gave priority to a claim of the United States for Title VIII and capital stock taxes only, over the state's claim for unemployment contributions. No Title IX tax was involved, against which a credit could have been claimed. The court's conclusion apparently was that, after the taxes collected by the debtor-employer from its employees under both the state and federal laws as special funds in trust for the respective governments had been paid, Section 3466 gave priority both to the United States for its capital stock and Title VIII taxes and to the state for its unemployment contributions, over any other claims, the priority claims so determined to share *pro rata*. Insofar as this decision treats the state's claim as tantamount to a claim of the United States for purposes of Section 3466, it of course has no validity in view of *Illinois* v. *United States*, 328 U. S. 8.

Even on this assumption, it must be admitted that the State's claim is not equal in priority with the federal claims under Section 3466 (*Illinois* v. *United States,* 328 U. S. 8) and that any credit for payment to the State under the expressed limitation in Section 902 can at most apply against only the federal unemployment compensation tax. Hence, it follows that at least the federal taxes which are not subject to the credit and which therefore have absolute priority under Section 3466 are to be satisfied in their entirety to the exclusion of the State's claim. These are the liabilities for capital stock tax of $21, and for insurance contributions taxes of $690.05, which total $711.05, exclusive of interest. The interest allowed in the District Court's judgment (R. 12, 18) on these two claims was $92.06.[18] Deducting the taxes and interest totalling $803.11 from the available assets of $1,131.11, there remains only $328 to be distributed, by some formula, as between the priority claim of the United States for the 1938 unemployment tax of $963.08 and interest thereon, and the State's inferior

[18] The District Court's judgment of $610.27 in favor of the United States (R. 12) was composed of the following amounts (cf. R. 18); $21 capital stock tax plus $8.76, interest at 6% from the due date until the date of judgment; $690.05 insurance contributions tax less $331.39 previously received, with interest of $83.30 from the due date to the date of judgment; and $96.31 unemployment compensation tax plus $42.24 interest to the date of judgment.

claim of $803.72 for contributions for 1938 and 1939.

If it is assumed that the whole $328 is available in the first instance for purposes of obtaining a credit, which of course is contrary to the fact, the assignee could have credit for only that amount against the federal tax of $963.08. As pointed out, Section 902, as amended, allows credit only in the amount actually paid into a state fund, but limited to a maximum of 90% of the federal tax. Applying the assumed credit against the federal tax of $963.08, there would remain an unsatisfied federal tax due of $635.08, plus interest, against which no credit is possible, and this portion of the federal tax with interest, at least, has a status of absolute priority. *Illinois* v. *United States, supra.* But since the amount exceeds the $328 actually available to pay both it and the State's claim, it follows that the United States under its priority is entitled to take the remaining $328 to the exclusion of the State.

Thus, the maximum credit which the assignee would be able to apply against the federal unemployment tax, assuming *arguendo* that it is possible for him to become entitled to any credit on the facts here, would not be large enough to prevent distribution of all the debtor's assets to the United States to satisfy its claims for the taxes which are accorded priority by Section 3466 of the Revised Statutes.

Both the State (Br. 26–31), and the State of Illinois as amicus curiae (Br. 27–30), suggest three possible methods of allocating the available assets as between the United States and the State. Our previous argument shows that the United States is entitled to all of the debtor's property on any view which may be taken, and it follows that none of the three methods of allocation is proper. The first method, favored by the State (Br. 26–27, 30–31), would satisfy the State's claim in full, first, on the theory that the State tax is a part of the Title IX tax which the assignee elected to pay first.[19] This method, of course, ignores Section 3466 and the decisions in the two *Illinois* cases, *supra*. The third method, favored by the State of Illinois (its Br. 29–30), would allow the United States on its Title IX claim only 10% of the fund available for distribution (after payment of the capital stock and insurance contributions taxes, with interest), instead of 10% of the tax which is due, as allowed in the second suggested method and by the District Court. Assuming here, *arguendo* only, that a choice must be made between the second and third methods, it seems plain that the United States would be entitled to 10% of the unemploy-

[19] Since the State tax does not have the status of a federal tax, the question as to whether the assignee could elect under Section 3466 to pay a particular one of the debts due the United States does not arise in this case. Cf. *United States* v. *Cochran*, Fed. Cas. No. 14,821; *United States* v. *Amory*, Fed. Cas. No. 14,443.

ment tax due under its priority, since even if the maximum credit had been obtained, this amount would be absolutely due to the United States. Cf. *United States* v. *New York*, 315 U. S. 510, where in a bankruptcy proceeding, in which the taxes due the United States and the States have equal priority, the Court approved a method of computing the allowable credit, which assumed that the United States was entitled to receive 10% of the Title IX tax actually due, rather than only 10% of the amount available for distribution.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Revised Statutes:

SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. (31 U. S. C., 1940 ed., Sec. 191.)

SEC. 3467 (as amended by Sec. 518 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680). Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid. (31 U. S. C., 1940 ed., Sec. 192.)

Social Security Act, c. 531, 49 Stat. 620:

SEC. 901. On and after January 1, 1936, every employer (as defined in section 907)

shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:

(1) With respect to employment during the calendar year 1936 the rate shall be 1 per centum;

(2) With respect to employment during the calendar year 1937 the rate shall be 2 per centum;

(3) With respect to employment after December 31, 1937, the rate shall be 3 per centum. (42 U. S. C., 1940 ed., Sec. 1101.)

SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the taxable year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903. (42 U. S. C., 1940 ed., Sec. 1102.)

SEC. 905. * * *

(b) Not later than January 31, next following the close of the taxable year, each employer shall make a return of the tax under this title for such taxable year. Each such return shall be made under

oath, shall be filed with the collector of internal revenue for the district in which is located the principal place of business of the employer, or, if he has no principal place of business in the United States, then with the collector at Baltimore, Maryland, and shall contain such information and be made in such manner as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulations prescribe. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926, shall, insofar as not inconsistent with this title, be applicable in respect of the tax imposed by this title. * * * (42 U. S. C., 1940 ed., Sec. 1105.)

SEC. 907. When used in this title—

(a) The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day (whether or not at the same moment of time) was eight or more. * * * (42 U. S. C., 1940 ed., Sec. 1107.)

Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360:

SEC. 902. (a) Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit for the amount of contributions, with respect to employment during such year, paid by him into an unemployment fund under a State law—

(1) Before the sixtieth day after the date of the enactment of this Act;

(2) On or after such sixtieth day, with respect to wages paid after the fortieth day after such date of enactment;

(3) Without regard to the date of payment, if the assets of the taxpayer are, at any time during the fifty-nine-day period following such date of enactment, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

* * * * *

(c) The provisions of the Social Security Act in force prior to February 11, 1939 (except the provisions limiting the credit to amounts paid before the date of filing returns) shall apply to allowance of credit under subsections (a), (b), and (h), and the terms used in such subsections shall have the same meaning as when used in title IX of the Social Security Act prior to such date. The total credit allowable against the tax imposed by section 901 of such Act for the calendar years 1936, 1937, and 1938, respectively, shall not exceed 90 per centum of such tax.

(d) Refund of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under subsections (a), (b), and (h), may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax. No interest shall be allowed or paid on the amount of any such refund.

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Revenue Act of 1943, c. 63, 58 Stat. 21:

SEC. 602. CREDIT AGAINST FEDERAL UNEMPLOYMENT TAXES FOR YEARS 1936 TO 1942.

(a) *Allowance of credit against tax for 1936, 1937, and 1938.*—Against the tax imposed by section 901 of the Social Security Act for the calendar year 1936, 1937, or 1938, any taxpayer shall be allowed credit (if credit is not allowable under section 902 of such Act) for the amount of contributions paid by him into an unemployment fund under a State law—

(1) Without regard to the date of payment, to the extent hereinafter provided in this subsection;

(2) Without regard to the date of payment, with respect to wages paid after September 19, 1939;

(3) Without regard to the date of payment, if the assets of the taxpayer were, at any time during the period August 11, 1939, to October 8, 1939, inclusive, or the period October 9, 1940, to December 6, 1940, inclusive, or the period September 21, 1941, to November 18, 1941, inclusive, in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction.

The provisions of the Social Security Act in force prior to February 11, 1939 (except the provision limiting the credit to amounts paid before the date of filing returns), shall apply to allowance of credit under this subsection; except that the amount of credit against the tax for the calendar year 1936, 1937, or 1938, for contributions paid after December 6, 1940, shall not (unless the credit is allowable on

account of paragraph (2) or (3)) exceed 90 per centum of the amount which would have been allowable as credit on account of such contributions had they been paid before the last day upon which the taxpayer was required under section 905 of such Act to file a return for such year. The terms used in this subsection shall have the same meaning as when used in title IX of such Act prior to February 11, 1939. The total credit allowable against the tax imposed by section 901 of such Act for the calendar year 1936, 1937, or 1938 shall not exceed 90 per centum of such tax.

* * * * *

(c) *Refund, credit, or abatement.*—

(1) Refund or credit of the tax (including penalty and interest collected with respect thereto, if any), based on any credit allowable under this section, may be made in accordance with the provisions of law applicable in the case of erroneous or illegal collection of the tax (including statutes of limitations). No interest shall be allowed or paid on the amount of any such credit or refund.

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